Supreme Court
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No. 94-449

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SANTA FE PACIFIC CORPORATION,
Petitioner,
v.
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Until 1984 Petitioner Santa Fe Pacific Corporation ("Santa Fe") owned Santa Fe Trails Transportation Company ("SFTT"). SFTT was a failing enterprise that Santa Fe wanted to get rid of. Among Santa Fe's concerns was an imminent withdrawal liability to Respondent Central States, Southeast and Southwest Areas Pension Fund ("Central States") under 29 U.S.C. § 1382 occasioned by the decline of SFTT. Santa Fe sought to pass this liability (estimated by Santa Fe to be as high as $11 million) along by selling the stock of SFTT. SFTT went bankrupt in 1985 thereby triggering the withdrawal liability. Central States assessed Santa Fe for $7.6 million.

The question presented is whether the Seventh Circuit correctly held that a stock sale transaction that otherwise might escape withdrawal liability under 29 U.S.C. § 1398, nonetheless subjects the seller to withdrawal liability under 29 U.S.C. § 1392(c) when a principal purpose of the stock sale was to evade or avoid withdrawal liability.

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BRIEF IN OPPOSITION

STATEMENT OF CASE

Respondent Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer pension plan within the meaning of Section 4001(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1301(a)(3). In 1980 Congress amended ERISA with the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). In MPPAA Congress provided that employers who contribute to multiemployer plans are liable for withdrawal liability if they cease to have an obligation to contribute (withdraw). *See Concrete Pipe and Products v. Construction Laborers Pension Trust*, —— U.S. ——, 113 S.Ct. 2264 (1993).

Santa Fe Trails Transportation Company ("SFTT") was a subsidiary of Petitioner Santa Fe Pacific Corpora-

tion ("Santa Fe"). SFTT contributed to Central States pursuant to a series of collective bargaining agreements. In 1984 Santa Fe sold the stock of SFTT in a leveraged buyout. *Santa Fe*, Pet. App. at 2a.[1] The operations of SFTT had already declined to a point where withdrawal liability was imminent. *Santa Fe*, Pet. App. at 4a. Santa Fe feared that it could be liable for up to $11 million if SFTT completely shut down. *Santa Fe*, Pet. App. at 5a. Santa Fe believed that if it could locate a purchaser for SFTT, it could transfer this liability and considered "desperation moves," including "selling it to someone in trouble." *Santa Fe*, Pet. App. at 5a. "The situation, in short, was that by selling the stock rather than the assets of the subsidiary Santa Fe stood to avoid millions of dollars in withdrawal liability, whereas without that potential liability the sale of the assets would have brought a higher price." *Santa Fe*, Pet. App. at 6a. Shortly after the sale of SFTT, the company went bankrupt and ceased all contributions to Central States in 1985.

The reason Santa Fe thought it could pass this withdrawal liability on to a stock purchaser is ERISA Section 4218(1), 29 U.S.C. § 1398(1).[2] That provision applies to changes in corporate structure described in § 1369(b), and it provides that no withdrawal occurs "solely" because of such a change. While the statute does not expressly apply to stock sales, the Pension Benefit Guaranty Corporation ("PBGC") has interpreted it to apply to stock sales. *See* PBGC Opinion Letter 82-4 (February 10, 1982) (Respondent's Appendix at 1a).

Central States nonetheless assessed Santa Fe for $7.5 million in withdrawal liability. In Central States' view,

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[1] This case summary is based on the opinion below, *Santa Fe Pacific Corp. v. Central States Pension Fund*, 22 F.3d 725 (7th Cir. 1994), contained in the Appendix to the Petition at pp. 1a-8a. The opinion below will be cited herein as "*Santa Fe*, Pet. App. at ——."

[2] We will hereafter refer to ERISA provisions by their codification at 29 U.S.C.

§ 1398 did not apply because Santa Fe had a principal purpose to evade or avoid withdrawal liability in violation of another statutory provision, § 1392(c). That provision permits plans to disregard such a transaction (here the stock sale) and to impose withdrawal liability accordingly. Santa Fe would be liable because under a third statutory provision, § 1301(b)(1), trades or businesses under common control constitute a single employer and thus are jointly and severally liable in the event of a withdrawal. *Vaughn v. Sexton*, 975 F.2d 498, 502 (8th Cir. 1992); *Pension Benefit Guaranty Corp. v. Ouimet*, 630 F.2d 4, 11 (1st Cir. 1980), *cert. denied*, 101 S.Ct. 1356 (1981).

Santa Fe contested the withdrawal liability by initiating arbitration pursuant to § 1401. The arbitrator ruled in favor of Santa Fe and was reversed on appeal to the district court, which remanded the case. The arbitrator again ruled in favor of Santa Fe and was again reversed. The third time the arbitrator ruled in favor of Santa Fe, the district court "with evident reluctance" affirmed. *Santa Fe*, Pet. App. at 2a. Central States then appealed to the United States Court of Appeals for the Seventh Circuit. That court in the decision below reversed the district court. "There can be no serious doubt that withdrawal liability was one of the principal considerations in the decision to sell SFTT." *Santa Fe*, Pet. App. at 3a.

REASONS FOR DENYING THE WRIT

Petitioner, Santa Fe, asks this Court to adopt an interpretation of ERISA that withdrawal liability under 29 U.S.C. § 1381 is foreclosed against the parent of a company where the subsidiary withdraws from a pension plan following the sale of its stock by the former parent. In other words Santa Fe seeks a general "safe harbor" rule based on § 1398 of such breadth that it reaches (and protects) even the dumping of a failing subsidiary whose certain liability would otherwise be Santa Fe's. To reach this conclusion, however, Santa Fe asks the Court to ignore § 1392(c) and thereby upset the balance Congress sought in permitting some transactions to occur without triggering withdrawal liability, but not those with a principal purpose of evading or avoiding liability.

The Court should deny the Petition for three reasons. Santa Fe misreads the statute, which clearly states and intends that §§ 1398 and 1392(c) be applied together in determining whether a seller is yet liable for withdrawal liability of a failed former subsidiary. Serious federal policies are simply not implicated in this process. Second, contrary to Santa Fe's assertions, there is no conflict among the circuits. All circuits agree that § 1392(c) will override a sale of stock exemption of § 1398 in appropriate circumstances, as did the court below. Finally, sales of stock of already failing subsidiaries are rare; and any perceived restrictions on such transactions by subjecting them to § 1392(c) simply does not threaten any important federal policy.

I. THE CORPORATE CHANGE PROVISION OF ERISA (§ 1398) DOES NOT OVERRIDE THE EVADE OR AVOID PROVISION (§ 1392(c)).

Congress enacted MPPAA to ensure that employers do not escape their funding obligations to multiemployer pension plans. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 104 S.Ct. 2709, 2713-2715 (1984). Indeed,

to ensure that employers could not escape by fractionalizing the business, Congress made groups of trades or businesses under common control ("controlled groups") liable as if they were a single employer. 29 U.S.C. § 1301 (b)(1). Controlled group liability, however, creates problems for certain business reorganizations. By altering the form of the controlled group, the employer might cause its own technical withdrawal from a plan even though contributions to that plan continue unabated. For that reason, Congress added 29 U.S.C. § 1398 to MPPAA.

The reason for § 1398 is to ensure that every reorganization or change of corporate form is not automatically a withdrawal because that would interfere unnecessarily with transactions that pose no threat to pension plans. That provision, however, also opens a door to potential problems. If most sales of stock do not threaten plans and are covered by § 1398, what about stock sales that do threaten plans? Congress balanced § 1398 with another provision designed to weed out abusive transactions. Under 29 U.S.C. § 1392(c) any transaction that has "a" principal purpose to evade or avoid withdrawal liability may be disregarded by the plan. Thus a sale of stock that is intended to evade or avoid withdrawal liability may be disregarded and the seller remains liable for withdrawal liability.

Santa Fe would turn this logic around. To Santa Fe every sale that meets the requirements of § 1398 would be absolutely exempt from withdrawal liability. To Santa Fe the decision of a parent corporation to sell the stock of a subsidiary may not be examined by a pension plan because in Santa Fe's analysis § 1398 is an absolute safe harbor. If Santa Fe were right, however, then both § 1398(c) and § 1301(b)(1) would lose much (or most) of their force.

Section 1301(b)(1) extends liability under ERISA to corporate parents and other trades or businesses under common control with a former contributor to a pension

plan. As Santa Fe sees it, however, a sale of a contributing subsidiary bars plans absolutely from seeking liability from the former parent if the former subsidiary withdraws. If Santa Fe is right, however, then there is little left of controlled group liability. Under the "Santa Fe rule" a company with a failing subsidiary could essentially give the stock away, passing the potential withdrawal liability on to another. Who would take on such liability? The management of the subsidiary or its employees (through, e.g., an ESOP) have ample incentive to keep their jobs. They might finance the transaction through the former parent by encumbering assets. They have nothing to lose by taking a long shot. But when the withdrawal occurs (as it generally will), the plan faces a contributor with no assets. Under the "Santa Fe rule" the efficacy of controlled group liability would be lost.

In addition Santa Fe's argument would leave little of the evade or avoid statute. Section 1392(c) was drafted with an eye toward corporate manipulations that might compromise a plan's attempts to collect withdrawal liability. The following was stated concerning 29 U.S.C. § 1392(c) during House debates:

> [T]he bill provides that transactions undertaken to evade or avoid withdrawal liability may not be used as a method of escaping withdrawal liability that would otherwise be imposed. It is intended that the plan sponsor, the arbitrator, and the courts follow the substance rather than the form of such transactions in determining, assessing, and collecting withdrawal liability.
>
> Furthermore, we intend that the term "employer" be construed in a manner consistent with the bill and its purposes. We intend that employers not be able to evade or avoid withdrawal liability through changes in identity, form, or control, or through transactions which are less than bona fide and arm's length. Hence, for example, a building and construction industry employer—or for that matter any employer

> contributing to a plan—will not be able to evade withdrawal liability by going out of business and resuming business under a different identity.

126 Cong. Rec. 23038 (1980) (statement of Rep. Frank Thompson). It is apparent from this statement that Congress was considering both § 1398 and §1392(c) together and that the latter complemented the former.

The relationship between § 1392(c) and other "safe harbor" provisions of MPPAA has also been explored by the courts to similar effect. Section 1384 exempts the seller in certain asset sales from withdrawal liability. The Seventh Circuit has recently held that once the parties to an asset sale meet the initial criteria for application of § 1384, then there is no liability for the seller except when § 1392(c) might apply. *Central States Pension Fund v. Cullum Industries, Inc.*, 973 F.2d 1333 (7th Cir. 1992). In responding to the argument that application of § 1384 to a sale should be limited to transactions that accord with general statutory purpose, the court noted that Congress provided express protections to plans, including § 1392(c).

> The pension plans and employees are protected, but the safeguards appear in other subsections of section 1384 and the MPPAA. For example, the section 1384 exemption applies only to a "bona fide, arm's-length sale of assets to an unrelated party." 29 U.S.C. § 1384(a)(1). Similarly, 29 U.S.C. § 1392(c) provides that "[i]f a principal purpose of any transaction is to evade or avoid liability," the withdrawal liability provisions of the MPPAA "shall be applied (and liability shall be determined and collected) without regard to such transaction." These two provisions ensure that businesses cannot avoid withdrawal liability through sham transactions.

Id. at 1340.[3]

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[3] The Court's use of the term "sham transactions" should not be taken literally. The court was not suggesting a standard, but only

Nonetheless Santa Fe urges this Court to adopt a rule that would exempt all sales from threat of seller withdrawal liability as long as they meet minimum statutory requirements of § 1398 and regardless of purpose.[4] Such a rule would leave plans helpless against corporate manipulations—even those that defeat statutory purpose. But Congress did not rest on statutory purpose, nor does Cenral States. Congress provided § 1392(c) as precisely the kind of backstop to statutory purpose that is necessary to balance a statutory exception to withdrawal liability.

Santa Fe argues that the Pension Benefit Guaranty Corp. ("PBGC") has issued an opinion letter supporting an absolute exemption for stock sales. That is simply not correct. In Opinion Letter 85-15 (May 31, 1985) PBGC noted only that "if a division of a corporation is first incorporated and then sold, the transaction does not *automatically* violate [§ 1392(c)]." (Respondent's Appendix at 7a.) Similarly the letter held that "the application of [§ 1384] to a sales transaction does not *by itself* violate [§ 1392(c)]." (Emphasis added.) *See also* PBGC Opinion Letters 84-7 (December 20, 1984) and 92-1 (March 30, 1992).[5] (Respondent's Appendix at 4a and 9a respectively.) Plainly PBGC understood that neither § 1398 nor § 1384 provide absolute exemptions from withdrawal liability and that these transactions would be measured against the evade or avoid statute, § 1392(c).

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an example. As the decision below held, "a principal purpose" is plainly a broader standard than "sham transaction."

[4] In the court below Santa Fe urged that § 1392(c) only apply to stock sales that were sham transactions. In the petition Santa Fe now urges an absolute exemption for stock sales.

[5] In each of these opinion letters PBGC took care to remind the public that § 1392(c) would apply to a sales transaction. Moreover, in Opinion Letter 92-1 PBGC noted that § 1398 might not fully relieve a seller of liability even in the absence of § 1392(c) . PBGC thus provides no support for Santa Fe's argument for an absolute exemption.

II. THE DECISION BELOW ACCORDS WITH THE DECISIONS OF THE OTHER CIRCUITS AND CONFLICTS WITH NONE.

Petitioner argues that the decision below conflicts with decisions in three other circuits. Apparently Petitioner has forgotten the question it presents to the Court since each circuit to consider the issue has arrived at the same conclusion in accord with the decision below. Petitioner asks whether a company may be held liable under § 1392(c) for withdrawal liability because it structured the sale of a subsidiary to take advantage of § 1398. As we show, no circuit has ruled that § 1392(c) can not apply to such transactions. To the contrary, each circuit has assumed that § 1392(c) can apply, and the circuits are in accord.

Petitioner's first case is the Third Circuit's decision in *Dorn's Transportation v. Teamsters Pension Trust Fund*, 787 F.2d 897 (3rd Cir. 1986). In that case Dorn's was sold to Oneida after which Oneida went bankrupt. The pension plan sought withdrawal liability from the seller on several theories including that the sale constituted an attempt to evade or avoid withdrawal liability in violation of § 1392(c).

Rejecting the plan's other arguments, the Third Circuit then considered the application of § 1392(c) to the sales transaction. "Surely, § 1392 was designed to guard against the intentional evasion of liability." *Id.* at 902. The court then applied § 1392(c) to the sales transactions employing the standard of whether "a principal purpose of the transaction as a whole [the stock sale] is to escape liability." *Id.* This is essentially the same standard used by the Seventh Circuit in the case below: whether a principal purpose of Santa Fe's decision to sell the stock of SFTT was to escape liability. In *Santa Fe* the seller was held liable while in *Dorn's* it was not. This difference in outcome, however, did not result from a conflict between the courts on the applicable law since they both agreed § 1392(c) could apply. It was the different facts of the two cases

that led one to find § 1392(c) violated while the other found it not violated.[6]

In Santa Fe's view the choice to bring a sale of business under § 1398 forecloses any inquiry into whether a principal purpose of that choice was to evade or avoid withdrawal liability. The Third Circuit did not adopt that view in *Dorn's*, but rather examined that choice to determine whether § 1392(c) was violated. This is exactly what the Seventh Circuit did in *Santa Fe*. Accordingly there is no conflict between these circuits on the question presented in the Petition.

Next Petitioner argues that there is a conflict between the court below and the Sixth Circuit in *Teamsters Pension Trust Fund v. Central Michigan Trucking, Inc.*, 857 F.2d 1107 (6th Cir. 1988). But the Sixth Circuit did not even address the § 1392(c) issue since it was not appealed to it. Petitioner states, however, that like the district court the Sixth Circuit "held that the Fund's § 1392(c) claim should be decided by an arbitrator." Pet. at 18. In fact the district court had remanded that question to arbitration. 698 F.Supp. 698 (W.D. Mich. 1987). Implicit in that remand is the court's conclusion that § 1392(c) should be applied to the sales transaction in that case.[7]

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[6] Actually the Third Circuit erred in applying the "a principal purpose" standard of § 1392(c). The Third Circuit believed that both seller and purchaser must share the purpose to evading or avoiding withdrawal liability—that a principal purpose of evade or avoid withdrawal liability by the seller alone is not enough to violate § 1392(c). Thus, while there is no conflict with the Seventh Circuit on whether § 1392(c) applies, the two circuits differ in its application in practice. Petitioner has not raised the latter question, however.

[7] As Petitioner notes, the district court stated that § 1392(c) would apply in the event that the sales transaction was a sham. Pet. at 18. Thus the *Central Michigan* courts, like the Seventh Circuit, agree that § 1392(c) applies even where the employer invokes § 1398. The circuits might disagree on whether the standard was "sham," but that is not the question presented in the

Apparently the Sixth Circuit agreed. But if § 1392(c) may be applied to the employer's decision to transfer stock in a subsidiary, as these courts allow, then there is no conflict between the Sixth and Seventh Circuits either.

Finally, and weakest of all, Petitioner cites *Cuyamaca Meats, Inc. v. Pension Trust Fund,* 827 F.2d 491 (9th Cir. 1987) for the proposition that there is a conflict between the court below and the Ninth Circuit. That case, however, did not even involve a sales transaction. Rather the company determined to continue its contributions to the pension plan as it was entitled to do under law. The company was not subject to § 1392(c) because it was not evading or avoiding withdrawal liability. As long as the company made contributions, there was no withdrawal, and there was no withdrawal liability to evade or avoid.[8] Thus there was no "transaction" to be disregarded under § 1392(c) except the payment of contributions itself. To treat the act of refusing to withdraw as a transaction to evade or avoid withdrawal liability, thus to create a withdrawal, would have made a mockery of this statute whose very purpose was to discourage employer withdrawals by imposing withdrawal liability. No such concern is implicated by applying § 1392(c) to § 1398. Accordingly there is no conflict between these circuits.

Petition. Further the "sham" standard was not actually adopted by these courts and appears to be simply loose language referring to the "evade or avoid" standard of the statute.

[8] There is a similarity to *Santa Fe,* but in that respect the cases are consistent. In both cases the withdrawal took place in the year after the challenged transaction. Central States treated Santa Fe's withdrawal as taking place when SFTT contributions actually ceased (not the previous year when the sale took place) and, pursuant to § 1392(c), treated Santa Fe as if it were still the parent corporation. The Ninth Circuit ruled analogously in *Cuyamaca,* where the withdrawal took place in the year contributions actually ceased (not the year the contract expired) and the liability was calculated and applied accordingly. Now if *Cuyamaca* had taken advantage of this gap in time to divest itself of assets or related companies, then § 1392(c) would apply to that decision.

III. THIS COURT SHOULD NOT CONSIDER THE SWEEPING RULE SOUGHT BY PETITIONER WHERE THE DECISION BELOW TURNS ON A UNIQUE SET OF FACTS AND AFFECTS ONLY A FEW TRANSACTIONS OF QUESTIONABLE MERIT.

Santa Fe argues that this Court should grant a writ of certiorari because the decision below "affects a large number of closed transactions and will affect an even larger number of future transactions." Pet. at 21. Of course, Santa Fe cites no basis for this conclusion, as there is none (probably explaining why this argument appears last in a petition that is otherwise largely a brief on the merits). If history may provide a measure, then this decision affects virtually no "closed transactions" and probably very few future transactions. Hardly a week (or even a day) must go by without some company selling a subsidiary that is one of the tens of thousands of employers that contribute to multiemployer pension plans. Yet for all these transactions only a very few may be found that raise questions concerning withdrawal liability.

The fact of the matter is that most (almost all) stock sales pass muster under § 1398. This is because, unlike Santa Fe's situation with SFTT, most sold subsidies are not already failing businesses (before the sale) that go bankrupt immediately after seller financial subsidiaries are withdrawn and where the purchaser has little or no unencumbered assets to pay withdrawal liability. Most sold subsidiaries are no doubt solvent (or who would buy them). If solvent, they continue to contribute to the pension plan, and there is no withdrawal, no withdrawal liability, and no problem with the decision below, even where the seller is aware of the potential withdrawal liability that is transferred in inchoate form. Santa Fe's type of transaction is quite different—where withdrawal liability is imminent—and is thus actually a narrow exception to the general class of stock sales where § 1392(c) might apply.

Cases like Santa Fe's are cases of desperation. Who buys a failing business? As Santa Fe found out, almost no one; a company is better off shutting down and liquidating assets before it becomes insolvent. But for withdrawal liability, Santa Fe would have liquidated SFTT. Instead it sold SFTT because that was Santa Fe's last hope to avoid withdrawal liability, which was virtually certain to be imposed on Santa Fe in about a year even if Santa Fe kept SFTT running.[9]

This, then, is the profile of a transaction Santa Fe wishes this Court to hold protected under § 1398: a failing subsidiary is sold for less than liquidation value to an almost assetless purchaser in a leveraged buyout for purposes of passing the withdrawal liability from the seller (who keeps the cash) to the purchaser (who acquires the debt). So far there have not been very many of these cases; but if Santa Fe is right, then there is hardly a withdrawal from a pension plan that could not be anticipated in advance and the liability transferred to another through a stock sale. The fact that there are so few reported cases suggests that potential sellers do not view a sale of stock as an opportunity to get rid of withdrawal liability, and do not do so. Santa Fe is the exception that thought it might get away with it. Under the rule sought by Santa Fe there would be many more of these transfers because § 1398 would provide a complete shield from liability that even the evade or avoid statute could not breach. A company facing withdrawal liability would be foolish not to take advantage.

Santa Fe argues that under the Seventh Circuit rule every decision to sell stock of a contributing subsidiary would violate § 1392(c) except where the seller was ignorant of withdrawal liability. This is not true. Every

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[9] Santa Fe and SFTT had already laid off over 70% of SFTT's employees and were two years into the three-year testing period for a partial withdrawal under 29 U.S.C. § 1385(a)(1) when the sale took place.

seller should be aware of withdrawal liability, but not every subsidiary is on the verge of withdrawal. It is the imminence of the withdrawal, coupled with the decision to divest, that makes "a" principal purpose of the sale to evade or avoid withdrawal liability.[10] Congress provided balance to the statute by permitting the ordinary stock sale while relying on § 1392(c) to catch those cases where withdrawal liability is spun off to a never-never land of noncollection. Employers' awareness of § 1392(c) provides an incentive to avoid risky transactions—a balance Congress certainly was aware of in the drafting. Except for a few cases like Santa Fe's, § 1392(c) has apparently held employers successfully in check, as it was intended, without (as Santa Fe fears) bringing commerce to its knees. This is the balance Santa Fe wishes to upset.

There is, apparently, no problem for this Court to resolve other than Santa Fe's obvious desire not to pay withdrawal liability at the expense of 400,000 participants and beneficiaries of Central States Pension Fund. These cases are rare, as noted, because most companies do not or cannot find a buyer for the stock of a failing subsidiary. In addition these cases are thoroughly fact bound. Santa Fe's arbitration took place over 15 days and involved hundreds of exhibits. The only other case similar to Santa Fe's involved almost as much fact finding. *Banner Industries and Central States Pension Fund,* 11 Employee Benefits Cases (BNA) BC 1149 (Am. Arb. Assn., January 22, 1988). These cases turn on unique sets of facts involving only a narrow class of stock sales. This Court should decline Santa Fe's invitation to adopt a sweeping general

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[10] Other factors besides imminent withdrawal may, of course, also come into play in defining an attempt to evade or avoid liability. For example, the size of the potential liability compared to the value of the subsidiary may be so disparate that avoidance of liability is driving the transaction. Deep factual inquiries will generally be necessary to sort out the various motivations of the seller in choosing the transaction.

rule to protect a small class of transactions that by themselves lack economic as well as legal merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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APPENDIX

[LOGO] 82-4

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006

Feb. 10, 1982

Re: Opinion Letter Regarding Withdrawal Liability Under the Multiemployer Pension Plan Amendments Act of 1980

Dear

We have received your letter in which you asked the Pension Benefit Guaranty Corporation ("PBGC") to rule on several issues arising under the provisions of the Multiemployer Pension Plan Amendments Act of 1980 (the "Act") as they apply to the transactions described in your letter and certain provisions which you propose to include in the sales agreement between the parties involved in those transactions. (Section references hereinafter are to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, as amended by the Act).

It is clear under the Act that the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan, and the amount of any liability resulting therefrom, lies with the plan sponsor. The Act further provides that any disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and then, if necessary, in the courts. Given this scheme for enforcement of the Act, it would be inappropriate for the PBGC to interject itself in such a determination by issuing an opinion on the application of the law to these particular transactions. The PBGC, however, will continue its practice of answering legal questions regarding the Act.

In that regard we point out that the sale by a parent corporation of the stock of a subsidiary corporation presents a question of statutory interpretation that we feel is appropriate to address. The legislative history to the Act contains the following example which indicates that there is no withdrawal liability solely as a result of a sale by a parent of stock of a subsidiary which was obligated to contribute to a multiemployer plan and continues such contributions after the sale:

> "The bill treats an employer as withdrawing from a multiemployer plan when the employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan. A withdrawal does not occur, however, where *an employer ceases to exist merely by reason of a change in form or structure*, as long as the employer is replaced by a successor employer and there is no interruption in the successor employer's contributions to the plan or obligation to contribute under the plan. A group of trades or businesses under common control is treated as a single employer. For example, if P Corporation owns 100 percent of the stock of S Corporation, a subsidiary that has an obligation to contribute to a multiemployer plan on behalf of its employees, the controlled group consisting of P and S would be considered an employer with an obligation to contribute to the plan. If P sells all of its interest in S to an unrelated party, the controlled group consisting of P and S would cease to exist. However, if S continues to have an obligation to contribute to the plan, no withdrawal would be considered to have taken place merely because of the change in ownership of S." 126 Cong. Rec. S10,115 (daily ed. July 29, 1980) and H.R. Rep. No. 96-869, Part II, 96th Cong., 2nd Sess. 162 (1980), reprinted in [1980] U.S. CODE CONG. & AD NEWS 3005-6. (emphasis supplied).

This example is an obvious reference to section 4218 (1)(A) of ERISA which provides that an employer shall not be considered to have withdrawn from a plan solely because the employer ceases to exist by reason of "a change in corporate structure described in section 4062 (d)", as long as no interruption in employer contributions or obligations to contribute under the plan occurs. Thus Congress clearly intended that a sale of stock of a subsidiary corporation is such a change in form or structure and that under section 4218 a withdrawal from a multiemployer plan does not occur when a parent sells the stock of a subsidiary corporation that contributes to a multiemployer plan and such contributions continue after the sale.

If you have any questions or wish to discuss these matters further, please contact Scot McCulloch of this office at (202) 254-4895.

Sincerely,

HENRY ROSE
General Counsel

[LOGO] 84-7

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006

[Dec. 20, 1984]

Dear

We have your letter raising several issues arising under the provisions of the Multiemployer Pension Plan Amendments Act of 1980 (the "Act").

Your first question concerns whether a withdrawal from a multiemployer pension plan will occur when corporation X organizes a wholly-owned subsidiary corporation Y and transfers to it all of the assets of one of its divisions. Section 4203 of ERISA provides that a withdrawal from a multiemployer plan has occurred when an *employer* permanently ceases to have an obligation to contribute under the plan, or permanently ceases all covered operations under the plan. (Section references herein are to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, as amended by the Act). Section 4001(b) defines an "employer" to include all trades or businesses under common control, and the PBGC's regulation on trades or businesses under common control, 29 C.F.R. Part 2612, provides that "trades or businesses which are under common control" has the same meaning as in Section 414(c) of the Internal Revenue Code ("IRC") and the regulations issued thereunder. Accordingly, if certain entities, such as X and Y, are under common control as defined in Section 414(c) of the IRC, they constitute the "employer" for purposes of Section 4203 of ERISA and no withdrawal will have occurred as a result of a transfer of assets from X to Y.

Your second question concerns the sale by X of all of the stock in its subsidiary corporation Y to your client A, an unrelated corporation which continues contributions to the plan on behalf of Y. You advise that neither X

nor A has made any other contributions to the plan; nor does either intend to make other contributions to the plan. You ask whether, as a result of the stock sale, X and Y would incur withdrawal liability under ERISA.

It is clear that Congress intended that no withdrawal occur solely because a parent employer sells the stock of a subsidiary, so long as the subsidiary continues to make its contributions to the plan. The legislative history to the Act contains the following analysis:

> A group of trades or businesses under common control is treated as a single employer. For example, if P Corporation owns 100 percent of the stock of S Corporation, a subsidiary that has an obligation to contribute to a multiemployer plan on behalf of its employees, the controlled group consisting of P and S would be considered an employer with an obligation to contribute to the plan. If P sells all of its interest in S to an unrelated party, the controlled group consisting of P and S would cease to exist. However, if S continues to have an obligation to contribute to the plan, no withdrawal would be considered to have taken place merely because of the change in ownership of S. 126 Cong. Rec. S10,115 (daily ed. July 29, 1980) and H.R. Rep. No. 96-869, Part II, 96th Cong., 2nd Sess. 162 (1980), reprinted in [1980] U.S. CODE CONG. & AD NEWS 3005-6.

Therefore, the sale of stock of Y to A does not effect a withdrawal, as long as Y continues to make its contributions to the plan.

Finally, with regard to the transaction you describe, we note that under Section 4212(c), if a principal purpose of any transaction is to evade or avoid liability under Part 1 of Subtitle E of Title IV of ERISA, that part shall be

applied (and liability shall be determined and collected) without regard to such transaction.

Sincerely,

/s/ Henry Rose
HENRY ROSE
General Counsel

[LOGO] 85-15

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006-1806

[May 31, 1985]

This responds to your request for the PBGC's opinion concerning Section 4204 of ERISA. Specifically you wish to know whether Section 4212(c) applies to a transaction involving a sale by an employer of an unincorporated division under Section 4204 when the sole purpose of applying Section 4204 is to avoid the seller's immediate withdrawal liability. Similarly, you wish to know whether Section 4212(c) applies if the division is first incorporated and then its stock is sold. In other words, can a plan disregard these transactions and impose liability on the seller because the sale violates the "principal purpose" rule of Section 4212(c)?

Section 4212(c) provides that "[i]f a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected), without regard to such transaction." Section 4204, on the other hand, provides a statutory exception to the general rule that an employer is liable if it ceases to contribute to a multiemployer pension plan. The purpose of Congress in providing Section 4204 was to allow an employer to avoid liability if a sales transaction meets the statutory conditions. Thus, the application of Section 4204 to a sales transaction does not by itself violate Section 4212(c). A plan, however, may find under all the circumstances of the transaction that Setcion 4212(c) was violated. A dispute in such a case would be subject to the dispute resolution procedures of Sections 4219 and 4221.

Likewise, as PBGC Opinion Letter 82-4 explains, the sale of the stock of a subsidiary is permitted without liability being incurred under the Act. Thus, if a division of a

corporation is first incorporated and then sold, the transaction does not automatically violate 4212(c). However, as expalined above, Section 4212(c) may be applied by a plan, if all the circumstances of the transaction so warrant, to disregard the transaction.

I hope this has been of assistance to you. If you have further questions concerning this matter, please contact of my staff at the above address or (202) 254-4873.

Very truly yours,

/s/ Edward R. Mackiewicz
EDWARD R. MACKIEWICZ
General Counsel

[LOGO] 92-1

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006-1860

[Mar. 30, 1992]

Re:

Dear

I write in response to your letter requesting the opinion of the Pension Benefit Guaranty Corporation ("PBGC") in regard to calculating liability for a complete or partial withdrawal under Section 4203 and 4205 of the Employee Retirement Income Security Act of 1974 ("ERISA"), *as amended,* 29 U.S.C. §§ 1383 and 1385 (1989). Specifically, your question concerns the calculation of withdrawal liability in a situation where several members of a controlled group of corporations have an obligation to contribute to the same multiemployer pension plan and the controlled group members are sold or liquidated in a series of transactions.

As you are aware, Section 4221 of ERISA provides that disputes between a plan sponsor and an employer on issues concerning withdrawal and withdrawal liability are to be resolved first through arbitration, and, if necessary, in the courts. The PBGC does not interject itself into these statutory procedures by issuing opinions on the application of the law to particular transactions. However, the PBGC will continue its practice of answering general questions of interpretation under Title IV of ERISA.

In the hypothetical situation you present in your letter, parent company P has four wholly-owned subsidiaries, A, B, C and D. The four subsidiaries contribute to a multiemployer pension plan (the "plan") in equal periodic amounts under a single collective bargaining agreement.

In a series of transactions, P's controlled group ceases covered operations at each of the subsidiaries. First, P

closes subsidiary A and does not continue operations previously performed by A. Second, P sells the assets of subsidiary B to an unrelated purchaser. The purchaser does not assume B's contribution obligation or make contributions to the Plan. Third, P sells the stock of subsidiary C to another unrelated purchaser. C continues in business and makes required contributions to the plan. Finally, P sells the stock of subsidiary D to a third unrelated purchaser. D continues operations and contributes to the plan for several years before going out of business. You request the PBGC's opinion as to the assessment of liability for a complete or partial withdrawal stemming from this series of transactions.

For purposes of determining whether a complete or partial withdrawal has occurred, all trades or businesses under common control are to be treated as a single employer. ERISA § 4001(b)(1), 29 U.S.C. § 1301(b)(1). Under Section 4203(a) of ERISA, 29 U.S.C. § 1383(a), a complete withdrawal generally occurs when an employer permanently ceases to have an obligation to contribute under a plan, or permanently ceases all covered operations under a plan. A partial withdrawal generally occurs when an employer has a 70% contribution decline in each of three consecutive plan years; or, the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements, but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or transfers such work; or, the employer permanently ceases to have an obligation to contribute with respect to work performed at one or more but fewer than all of its facilities, while continuing to perform work at that facility of the type for which the obligation to contribute ceased. ERISA § 4205 (a) and (b), 29 U.S.C. § 1385(a) and (b). The methods for computing the amount of liability for a complete or partial withdrawal are set forth in Sections 4211 and 4206 of ERISA, 29 U.S.C. §§ 1391 and 1386. In order to determine whether a complete or partial withdrawal has

occurred and the amount of the resulting liability, contributions of the entire controlled group must be taken into account. 29 U.S.C. §§ 1301(b)(1) and 1391.

As you point out in your letter, when subsidiary A is closed in the first transaction, there is no complete or partial withdrawal by the controlled group. Three members of the controlled group continue to have an obligation to contribute to the plan and continue covered operations. There is no partial withdrawal because, on the facts assumed, there has not been a 70% decline in contributions by the controlled group over a three-year period or a partial cessation of the controlled group's contribution obligation within the meaning of Section 4205(b)(2)(A) of ERISA, 29 U.S.C. § 1385(b)(2)(A). Thus, for purposes of calculating the amount of liability for a subsequent complete or partial withdrawal under Section 4211 and 4206 of ERISA, 29 U.S.C. §§ 1391 and 1386, A's contribution history remains part of the controlled group's contribution history.

The same holds true on the sale of B's assets to an unrelated purchaser. Even though the asset sale is not structured to meet the requirements of Section 4204 of ERISA, 29 U.S.C. § 1384, there is no complete or partial withdrawal because two other members of the controlled group continue to contribute to the Plan and there has been no 70% decline in contributions over three years or any partial cessation of the controlled group's contribution obligation under 29 U.S.C. § 1385(b)(2)(A). Again, the contribution history of B remains part of the controlled group's contribution history for purposes of calculating amounts of subsequent withdrawal liability.

The sale of the stock of subsidiary C to an unrelated purchaser that continues to make contributions to the plan would ordinarily fall within the ambit of Section 4218 of ERISA, which provides in relevant part:

> Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because—

(1) an employer ceases to exist by reason of—

(a) a change in corporation structure described in Section 4069(b) . . .

if the change causes no interruption in employer contributions or obligations to contribute under the plan . . . .

* * *

[A] successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

29 U.S.C. § 1398.

Among the changes described in Section 4069(b) of ERISA, 29 U.S.C. § 1369(b), are "a mere change in identity, form, or place of organization" and "a merger, consolidation or division." In Opinion Letters 82-4 (February 10, 1982), 83-11 (May 16, 1983), and 84-7 (December 20, 1984), the PBGC expressed its opinion that the sale of a subsidiary's stock does not bring about the withdrawal of the parent corporation, if the change causes no interruption in employer contributions or obligations to contribute under the plan.

Under the last sentence of Section 4218 of ERISA, a successor employer resulting from a restructuring described in that Section is considered the "original employer." This provision attributes the contribution history of the original employer to the successor employer resulting from the restructuring. In the typical case, the contribution history used to determine the withdrawal liability of the successor will be the contribution history that would have formed the basis for withdrawal liability if the restructuring had not occurred.

In your hypothetical, the sale of C's stock causes no interruption in contributions or obligations to the plan. C and its new controlled group, if any, and the P controlled group, continue to contribute to the Plan. Consequently, there is no complete withdrawal by the P con-

trolled group, or by C and its new controlled group, if any. Pursuant to the last sentence of Section 4218, both the P controlled group and C and its new controlled group, if any, are "successor" employers. However, in a situation such as this where multiple entities in the same controlled group contribute to the same plan, and some, but not all, of the controlled group members who contribute to the plan are the subject of a change described by Section 4218 of ERISA, neither of the successors clearly should inherit the entire contribution history of the original employer. In such a case, it is the PBGC's opinion that the contribution history of the original employer must be fully apportioned among the successor employers. The plan should make the allocation in a reasonable manner. For example, in the absence of a history of large transfers of operations or covered employees between members of the controlled group, or other unusual factors, the plan may allocate that contribution history in proportion to the contribution histories of the controlled group members that have an obligation to contribute and covered operations immediately before the Section 4218 transaction, or in your hypothetical 50% to C and 50% to the P controlled group.

Consequently, in the event of a subsequent complete withdrawal by the P controlled group, the amount of liability under Section 4211 of ERISA, 29 U.S.C. § 1391, is determined without reference to the contribution history allocable to C and its new controlled group, if any. Likewise, in the event of a subsequent complete withdrawal by C and its new controlled group, if any, the amount of liability under Section 4211 of ERISA, 29 U.S.C. § 1391, is determined without reference to the contribution history allocable to the P controlled group.

You also inquired as to the effect of the sale of C's stock on determining whether a partial withdrawal occurs under Section 4205(a)(1) of ERISA, 29 U.S.C. § 1385 (a)(1). Under your hypothetical, once C is sold, the contributions of the P controlled group decline by 75%.

Generally, a partial withdrawal occurs whenever there is a 70% contribution decline in each of three consecutive plan years measured against a base year. *See* 29 U.S.C. 1385(b)(1). Under Section 4218 of ERISA, P's controlled group would not ordinarily incur a partial withdrawal in the third plan year following the sale of C's stock. However, in order to avoid partial withdrawal liability, the decline in contributions must be "solely" because of a covered change in corporate structure. 29 U.S.C. § 1398.

In your hypothetical, it is not clear whether the decline in contributions is solely because of the sale of C's stock. The decline could be due, at least in part, to closing A and selling the assets of B to a purchaser who did not continue making contributions to the Plan. Whether a decline in contributions is solely because of a covered restructuring must be determined on the facts and circumstances of each case and should be addressed by arbitration subject to review by the courts. Relevant considerations might include the length of time between transactions, whether the transactions were related, and whether each transaction would have been subject to Section 4218 if viewed individually.

If the decline in contributions is determined to be solely because of the sale of C's stock, the contribution history transferred in the Section 4218 transaction is excluded from the base year calculations used to determine whether a 70% decline has occurred under Section 4205(b)(1)(B)(ii) of ERISA. If the decline in contributions is determined not to be solely because of the sale of C's stock, C's contribution history is included in the base year calculations.

In the final transaction, D's stock is sold to a third unrelated purchaser who continues making contributions to the Plan on behalf of D's employees. After the stock sale, the P controlled group ceased covered operations and no longer has an obligation to contribute to the Plan.

Under Section 4218 of ERISA, the P controlled group would not ordinarily be subject to withdrawal liability on the sale of D's stock. As stated above, however, in order to avoid withdrawal liability, the controlled group must cease to have such operations or such obligations "solely" because of a covered change in corporate structure. 29 U.S.C. § 1398. As discussed above, whether an employer's cessation is solely the result of a covered restructuring must be determined on the facts and circumstances of each case and should be addressed by arbitration subject to review by the courts:

Assuming that the controlled group's cessation is not solely because of a covered restructuring, it incurs a complete withdrawal. However, D and its new controlled group, if any, would be a "successor" within the meaning of the last sentence of Section 4218. Consequently, a portion of the P controlled group's remaining contribution history must be allocated to D and its new controlled group, if any, under the principles discussed above. The P controlled group's liability is then determined pursuant to Section 4211 of ERISA, 29 U.S.C. § 1391, based on the contribution history of the original employer that was not transferred to C or D. C and its new controlled group, if any, remains responsible for the contribution history previously allocated to C.

Alternatively, if the controlled group's cessation is determined to be solely because of a covered restructuring, the controlled group is not subject to withdrawal liability, even though it no longer has an obligation to contribute to the Plan or has covered operations under the Plan. In that event, D and its new controlled group, if any, inherits the contribution history of the P controlled group that was not allocated to C.

You also ask if the result would be different if the assets of D are sold in a transaction that meets the requirements of Section 4204 of ERISA, 29 U.S.C. § 1304. Under Section 4204(a)(1) of ERISA, an employer will not incur liability for a complete or partial withdrawal

"solely" because of the sale of all or a portion of its assets to an unrelated purchaser if the following conditions are met. First, the purchaser must have an obligation to contribute to the pension plan for substantially the same number of contribution base units as the seller. Second, the purchaser must provide a cash or surety bond payable to the pension plan in the five years after the sale if the purchaser withdraws or fails to make required contributions. Third, the contract for sale must provide that if the purchaser withdraws in the five years after the sale and fails to pay its withdrawal liability, the seller is secondarily liable. 29 U.S.C. § 1384(a)(1).

Under Section 4204(b)(1) of ERISA, 29 U.S.C. § 1384(b)(1), the liability of the purchaser for a subsequent complete or partial withdrawal is determined as if the purchaser was required to contribute to the plan the amount the seller was required to contribute for the operations transferred for the year of the sale and the four previous years. Thus, the purchaser assumes the contribution history of the seller for the year of the sale and the four plan years preceding the sale, but only for the contribution history relating to the assets transferred in the sale.

In your hypothetical, if the assets of D are sold in a sale that meets the requirements of Section 4204 of ERISA. the P controlled group has ceased covered operations and no longer has an obligation to contribute to the Plan. Like the sale of stock situation discussed above, the P controlled group would not ordinarily be subject to withdrawal liability on the sale of D's assets. However, under Section 4204(a)(1), as under Section 4218, in order to avoid withdrawal liability, the controlled group's cessation must occur "solely" because of a sale of assets. Again, the question of whether an employer's cessation is solely because of a particular transaction must be determined on the facts and circumstances of each case and should be addressed by arbitration subject to review by the courts.

Assuming that the controlled group's cessation is solely because of the asset sale, the controlled group does not incur withdrawal liability even though it no longer has an obligation to contribute to the Plan or has covered operations under the Plan. However, the controlled group is secondarily liable if D and its new controlled group, if any, withdraw from the Plan within 5 years of the asset sale and fail to make withdrawal liability payments. D and its new controlled group, if any, assume the contribution history relating to D's operations for the year of the sale and the previous four years.

If the controlled group's cessation is determined not to be solely because of the sale of D's assets, it incurs a complete withdrawal and its liability is determined pursuant to Section 4211 of ERISA, 29 U.S.C. § 1391, based on the contribution history of the original employer that was not transferred to C.

As a final matter, the opinions in this letter are subject to the special rule in Section 4212(c) of ERISA, which states:

> If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability determined and collected) without regard to such transaction.

29 U.S.C. § 1392(c). Depending on the facts, some of the same considerations as are relevant in determining whether a cessation is due "solely" to a restructuring or sale of assets may be relevant under Section 4212(c).

I hope this has been of assistance to you. If you have any further questions, please ———— of my staff at

Very truly yours,

/s/ Carol Connor Flowe
CAROL CONNOR FLOWE
General Counsel